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In The

Supreme Court of the United States

October Term 1997

THOMAS A. WILKINSON, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

EDWARD M. CONK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether a finding of interstate commerce in a federal money laundering prosecution is a necessary predicate to subject matter jurisdiction under Art. III, § 2.

II. Whether the Fourth Circuit's plain error review was consistent with this Court's precedents and historical practices.

III. Does a defendant's loan of funds obtained through wire fraud to his separate legitimate businesses, or the repayment of that loan, "promote" or "conceal" the predicate crime of wire fraud in violation of the Money Laundering Statute, 18 U.S.C. § 1956(a)(1)(A)(i), (B)(i)?

IV. What is the proper standard of materiality under 18 U.S.C. § 1623 in a prosecution for perjury during a civil deposition, and was there sufficient evidence to satisfy this standard where the Government failed to introduce any evidence about the purpose of the deposition in which Petitioner Conk made the false statement?

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Thomas A. Wilkinson, III, and Edward M. Conk respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1-39) is reported at 137 F.3d 214. The judgments of the district court in United States v. Wilkinson (App., infra, 42-49) and United States v. Conk (App., infra, 50-57) are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 25, 1998. The Court of Appeals denied a timely petition for rehearing on April 17, 1998. See app., infra, 40-41. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to this petition contains the pertinent parts of the following constitutional and statutory provisions: United States Constitution, Article III, Section 2 (see app., infra, 58); Title 18 of the United States Code, §§ 1623 (see app., infra, 58), 1956 (see app., infra, 59), and 3231 (see app., infra, 60); and Federal Rules of Criminal Procedure 12(b)(2) (see app., infra, 60), 30 (see app., infra, 61), and 52 (see app., infra, 61).

STATEMENT OF THE CASE

I. Factual Background

In 1987, Petitioners Edward M. Conk and Thomas A. Wilkinson III formed Medical Payment Services of Virginia, Inc. ("MPS") to finance the receivables of physicians and other health care providers. See app., infra, 3-4. In the Fall of 1988, MPS entered into a line of credit agreement with Health Line, Inc. ("HLI"), a wholly-owned subsidiary of Blue Cross and Blue Shield of Maryland, that provided that HLI would advance a line of credit of up to five million dollars to MPS. See id. at 4. The agreement further provided that MPS could use the HLI funds only to finance health-care related receivables, (see id.) and required MPS to maintain collateral from such entities.

After MPS secured the line of credit from HLI, it used those funds to finance physicians and other health care providers. However, Petitioners eventually used some of the money to make loans to several of their own non-medical businesses. See app., infra, 4. MPS obtained money from HLI through wire transfers by submitting loan requests (via facsimile) that falsely indicated that the funds requested would be secured by conforming accounts receivable. See id. These wire transfers and facsimile transmissions were the predicates for several counts of wire fraud. See id. Petitioners' loans of funds from MPS to their separate businesses were the predicates for five counts of money laundering (the Promotion Counts). See id.

During the course of business, the Petitioners made repayments of the non-medical loans to MPS and then in turn to HLI. See app., infra, 5. These were the predicates for six additional money laundering counts (the Concealment Counts). See id.

The evidence at trial showed that the loans to the non-medical businesses were recorded in MPS's books under fictitious names that sounded like health care providers. See

app., infra, 4-5. For instance, Hawthorne Construction Excavators, Inc., a construction company owned by Wilkinson, was recorded under the name "Health Emergency, Inc." See id. DayDream Publishing, a corporation in which Conk had an interest, was recorded under the name "American Surgical." See id. at 4. Conk did not testify at trial, but he did testify in an earlier deposition in a civil case that he had never heard of "American Surgical" (see id. at 7). A brief excerpt from this deposition containing this statement was introduced at trial to support the perjury charge. However, the Government did not offer any evidence about the basis for the civil suit or the goal of the deposition to show that the false statement was material.

II. Proceedings Below

Petitioners were tried before a jury in the United States District Court for the Eastern District of Virginia in December 1995. After the close of evidence, the judge instructed the jury on the element of interstate commerce for money laundering:

> It is not necessary for the government to show that the defendants actually intended or anticipated an effect on interstate or foreign commerce by their actions or that commerce was actually affected. All that is necessary is that the natural and probable consequences of the acts the defendants took [sic] would affect interstate or foreign commerce. If you conclude that there would be any effect at all on interstate or foreign commerce, then that is enough to satisfy this particular element. The effect can be minimal.

The judge thus instructed the jury that it only had to find a potential, as opposed to an actual, effect on interstate

commerce. Neither Petitioner objected. However, the Fourth Circuit had previously held, in a similar prosecution under 18 U.S.C. § 1957, that the jury must be instructed to find that the money laundering had an actual, even if de minimis, effect on interstate commerce. See United States v. Aramony, 88 F.3d 1369, 1387 (4th Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997).

Petitioners were convicted of eight counts of wire fraud in violation of 18 U.S.C. § 1343, and nine counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(1) and (B)(1). See app., infra, 42, 44, 50, 52. They were also convicted of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (see id. at 42, 50); the objects of the conspiracy were alleged to be the wire fraud and money laundering. Petitioner Conk was also convicted of one count of bank fraud in violation of 18 U.S.C. § 1344 and one count of perjury in violation of 18 U.S.C. § 1623. See id. at 50, 52.

On appeal, Petitioners challenged their money laundering convictions on the grounds that the transactions that formed the bases of the money laundering counts were not separate and distinct from the specified unlawful activity, i.e. wire fraud. Brief of Appellants at 23. Alternatively, Petitioners challenged their convictions on the Promotion Counts, 18 U.S.C. § 1956(a)(1)(A)(i), on the ground that their transfers of funds to their separate legitimate businesses were "lifestyle expenditures" that did not promote the crime of wire fraud. See app., infra, 10. They challenged their convictions on the Concealment Counts, 18 U.S.C. § 1956(a)(1)(B)(i), on the grounds that the Government did not prove that the transactions involved proceeds of the specified unlawful activity, and that the only activity that amounted to concealment, i.e. the use of false names in the MPS record-keeping, was not a part of the transfer of funds from the separate businesses to the MPS bank account that gave rise to the Concealment Counts. Brief of Appellants at 25-30. The Fourth Circuit dismissed the fact that the transactions

were part of the scheme to defraud as inconsequential, and held that the loans to Petitioners' separate businesses promoted the scheme to defraud because the "scheme" was to misapply funds. See app., infra 10. The court of appeals, reviewing for plain error, also held that the conviction for money laundering was not reversible based on the erroneous jury instruction. See app., infra, 16, 17.

Petitioner Conk challenged his perjury conviction on the grounds that the Government had offered no evidence to show how the false statement in the civil deposition was material. Brief of Appellants at 36-38. While acknowledging a split in the circuits, the Fourth Circuit refused to decide which standard was appropriate because, in its view, the "overwhelming evidence" of materiality met even the more stringent standard. See app., infra, 19, 27. The Fourth Circuit's characterization of this evidence as "overwhelming" is mystifying in light of the government's failure to introduce any evidence about the basis for the civil trial other than the fact that Petitioners were sued by HLI and found personally liable for damages.

III. How the Federal Question Was Presented

The jurisdiction of the district court was invoked under 18 U.S.C. §§ 371, 1343, 1344, 1623, and 1956. However, Petitioners assert the district court's erroneous jury instruction on interstate commerce deprived the district court of jurisdiction over the money laundering counts, 18 U.S.C. § 1956.

REASONS FOR GRANTING THE PETITION

Petitioners ask this Court to grant a Writ of Certiorari to answer four issues, three of which concern their money laundering convictions. The fourth relates to Petitioner Conk's perjury conviction. A determination of these issues will have profound importance in future federal criminal prosecutions. The first money laundering issue concerns whether an erroneous jury instruction on the element of interstate commerce, not objected to at trial, deprived the district court of jurisdiction over the money laundering counts. Petitioners argue that as a consequence of the erroneous jury instruction, their conviction for money laundering is null and void. The second money laundering issue is whether the Fourth Circuit, when reviewing for plain error, misinterpreted prior precedents of this Court. The third money laundering issue concerns the proper construction and application of the money laundering statute. The issue relating to Conk's perjury conviction is whether the Fourth Circuit used the proper standard to determine materiality in a perjury prosecution for statements made in a civil deposition, when the Government presented no evidence of materiality.

This case presents not only an opportunity to correct a split among the courts of appeals, but also to formulate and apply the proper standards for the enforcement of federal criminal law in the federal courts. See McNabb v. United States, 318 U.S. 332, 340-41 (1943). Moreover, the decision below is erroneous, resulting in the violation of the Petitioners' constitutional rights.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE A QUESTION OF FIRST IMPRESSION, AN ANSWER TO WHICH WILL PROFOUNDLY SHAPE THE POWER OF THE FEDERAL JUDICIARY: WHETHER, AS A RESULT OF AN INCORRECT JURY INSTRUCTION ON THE ELEMENT OF INTERSTATE COMMERCE, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SENTENCE THE PETITIONERS. IN THE ALTERNATIVE, EVEN IF THIS COURT SHOULD DECIDE JURISDICTION WAS PROPER, THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE FOURTH CIRCUIT'S PLAIN ERROR ANALYSIS.

A. The District Court Was Without Subject Matter Jurisdiction When It Sentenced The Petitioners, And As A Consequence, The Petitioners' Sentences Are Null And Void.

No standard governing the scope of appellate review is more frequently applied than the rule that "an error not raised and preserved at trial will not be considered on appeal." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5, at 1158 (2d. ed. 1988); see FED. R. CRIM. P. 30. However, there exist two general exceptions to the "raise it or waive it" rule: (1) lack of jurisdiction; and (2) plain error. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5, at 1159 (2d. ed. 1988); compare FED. R. CRIM. P. 12(b)(2) (defense or objections based on defects in jurisdiction need not be raised prior to trial) with FED. R. CRIM. P. 52(b) (plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.).

As an initial matter, the failure to object to the erroneous interstate commerce jury instruction should not have been reviewed using a plain error analysis.[1] True, plain error generally applies to failure to object to an erroneous jury instruction on direct review. See United States v. Frady, 456 U.S. 152, 163 (1982). But plain error review applies only to rights that have been forfeited. Johnson v. United States, 117 S. Ct. 1544, 1549 (1997); United States v. Olano, 507 U.S. 725, 731 (1993).

This case thus provides the opportunity for this Court to resolve two questions of profound importance in federal criminal prosecutions. The first is whether a finding by a jury of an effect on interstate commerce is necessary to confer federal subject matter jurisdiction upon a Federal District Court. The second is whether jurisdiction may ever be forfeited.

1. A finding of interstate commerce is a necessary predicate of subject matter jurisdiction.

Interstate commerce is related to 18 U.S.C. § 1956 because it is part of the definition of "financial transaction." See 18 U.S.C. § 1956(c)(4)(A). A financial transaction must affect interstate commerce in "any way or degree." See id. Although there remains a lack of authority with respect to the connection between jurisdiction and interstate commerce, one circuit has held, at least in the context of 18 U.S.C. § 1957(a), that interstate commerce must be demonstrated in order to confer subject matter jurisdiction on a federal court. See, e.g., United States v. Trammell, 133 F.3d 1343, 1353

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[1] Subject matter jurisdiction is being raised for the first time in this Court and was not argued below. Nevertheless, an objection to the adjudicatory power of a court may be raised for the first time at any stage of the litigation, including in the Supreme Court. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398 (1979).

(10th Cir. 1998); United States v. Kelley, 929 F.2d 582, 586 (10th Cir. 1991), cert. denied, 502 U.S. 926 (1991). Indeed, this answer seems to comport with older federal cases, see, e.g., United States v. Rogers, 23 F. 658 (W.D. Ark. 1885) (jurisdiction is never presumed in a criminal proceeding, but must always be proved), and appears to be in accord with this Court's recent opinion in United States v. Lopez, 514 U.S. 549, 561-62 (1995), where the Court suggested that a case-by-case inquiry is necessary to determine whether jurisdiction based on interstate commerce exists. The theory that a finding of interstate commerce is interrelated to a district court's jurisdiction is in accord with cases from this Court that have held that jurisdiction may be lost if the trial is not conducted consistent with the Sixth Amendment. See Johnson v. Zerbst, 304 U.S. 458, 468 (1938). However, one circuit has held that interstate commerce is not a necessary predicate for subject matter jurisdiction. See United States v. Ryan, 41 F.3d 361, 363 (8th Cir. 1994), cert. denied, 514 U.S. 1082 (1995). Petitioners submit that Ryan merely demonstrates the different understandings of criminal subject matter jurisdiction within the various courts of appeals, and shows precisely why this Court needs to clarify this important area of the law.

Resolution of the ultimate issue, then, turns on the answer to the question of first impression presented here: can a defendant's entitlement to an instruction on the element of interstate commerce, i.e., the very basis for jurisdiction, ever be forfeited? If, as Petitioners urge, it cannot be forfeited, then the Fourth Circuit's plain error review in this case was inappropriate.

2. Just as subject matter jurisdiction cannot be waived, it cannot be forfeited.

Federal courts are courts of limited jurisdiction. Insurance Corp. of Ireland, Ltd. et al. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 701 (1982). Their

subject matter jurisdiction is delineated in Article III, § 2 of the United States Constitution ("Art. III, § 2"). Id. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction.[2] Id. "Subject matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." Id. at 702. An objection may be raised at any time during direct review, and may be raised *sua sponte*. See id. This Court has repeatedly noted: "The inexorable command [of Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." Morrison v. Olsen, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting) (alteration in original) (quoting Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-59 (1982)).

The importance of subject matter jurisdiction is reflected in the consequences of failure to satisfy the subject matter jurisdiction requirements.[3] In the civil context, this Court has held that the validity of a District Court's order depends upon the validity of its subject matter jurisdiction. See id. at 701. In the criminal context, this Court has held that a judgment of conviction pronounced by a court without jurisdiction is void. See Johnson v. Zerbst, 304 U.S. 458,

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[2] The relevant statutory grant of jurisdiction in federal criminal matters is 18 U.S.C. § 3231 which provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

[3] The proposition that a judgment of a court lacking jurisdiction was void is embodied in the phrase "coram non judice," which literally means "before a person not a judge." Burnham v. Superior Court of California, 495 U.S. 604, 608-09 (1990). This has been interpreted to mean that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could not render a judgment. See id.

468 (1938); Ex Parte Lange, 85 U.S. 163, 178 (1873). Other than this distinction, the Court has not discussed the differences, if any, between criminal and civil subject matter jurisdiction. Unless the Court addresses this issue, lower courts will continue to use principles of subject matter jurisdiction interchangeably in both contexts.

In addition to a court's power to render a verdict, other legal consequences directly follow from the role Article III, § 2 plays in the Federal judiciary. See Insurance Corp. of Ireland, Ltd., 456 U.S. at 702. It is well understood that no action of the parties can confer subject matter jurisdiction upon a federal court, the consent of the parties is irrelevant, principles of estoppel do not apply, and subject matter jurisdiction cannot be waived.[4] See id. The only issue that has been left unanswered by this Court is whether jurisdiction may be forfeited.

This Court has often recognized that a party may not waive subject matter jurisdiction. Pennsylvania v. Union Gas, 491 U.S. 1, 25 (1989) ("[t]he cases are legion holding that a party may not waive a defect in subject matter jurisdiction ...."), overruled on other grounds by Seminole Indian Tribe of Florida v. Florida, 517 U.S. 44 (1996). While it is true that the most basic rights of criminal defendants are subject to waiver, the Court has assumed, without deciding, that a litigant in the criminal context cannot waive the structural protection of Article III, § 2. See Peretz v. United States, 501 U.S. 923, 937 (1991). This Court has reasoned that notions of consent and waiver cannot be dispositive because the limitations in Article III, § 2 serve institutional interests that the parties cannot be expected to protect. See Commodities Future Trading Commission v. Schor, et al., 478 U.S. 833, 851 (1986). If this is still true, it is hard to think of a principled reason for a different result in the criminal context. Lower courts have clearly assumed

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[4] The only exception that the Court has identified is that principles of res judicata apply to jurisdictional determinations. Insurance Corp. of Ireland, Ltd., 456 U.S. at 702 n. 9.

that the same principles regarding waiver and subject matter jurisdiction also apply in the criminal context. See, e.g., Sealed Appellant v. Sealed Appellee, 130 F.3d 695, 697 (5th Cir. 1997); United States v. Adesida, 129 F.3d 846, 849 (6th Cir. 1997), cert. denied, 118 S. Ct. 1688 (1998); United States v. Navarro, 959 F. Supp. 1273, 1277 (E.D. Cal. 1997).

But the issue of whether jurisdiction may be forfeited is more complicated than it may first appear. This Court has recently held that waiver is different than forfeiture. See Olano, 507 U.S. at 733. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " Id. quoting Johnson v. Zerbst, 304 U.S. at 464; see also Peter Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 MICH. L. REV. 1214, 1254-55 (1977) (In contrast to waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind and is justified by the state's interest in the finality of conviction.).

Although this issue has never been decided by the Supreme Court, Justice Scalia has implied that forfeiture does not apply to jurisdictional claims. Freytag v. Comm'r. of Internal Revenue, 501 U.S. 868, 893-94 (1991) (Scalia, J., concurring). Justice Scalia reasoned that a right that cannot be waived cannot be forfeited (but the converse is not always true). Id. at 895 n.2. Moreover, Justice Scalia, while cautioning that not all structural errors will cause a judgment to be set aside, suggested that a jurisdictional defect may be noticed at any time:

> [S]ince a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to remedial, effect, i.e., the effect of approving,

> ex ante, unlawful action by the appellate court itself.

Id. at 896-97. Thus, if one considers the institutional reasons why subject matter jurisdiction cannot be waived or conferred by any act or omission of the litigants, then it may reasonably follow, *a fortiori*, that subject matter jurisdiction cannot be forfeited. If jurisdiction cannot be forfeited, and if plain error analysis is reserved for forfeited rights, then the Fourth Circuit's review was erroneous.[5] Failure by this Court to take notice of this jurisdictional defect would, as suggested by Justice Scalia's comment above, have the effect of approving, ex ante, the unlawful action of the Fourth Circuit in reviewing for plain error.[6] See id.

In sum, this case presents the opportunity for the Court to answer questions relating to the structure of the judiciary's power under the Constitution, but the absence of a definitive interpretation of Article III § 2 could threaten the finality of convictions throughout the federal criminal system. Because an answer to this question would prevent

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[5] If subject matter jurisdiction cannot be forfeited, the Court may be tempted to review jurisdiction under FED. R. CRIM. P. 52(a) (harmless error) which governs non-forfeited errors. Olano, 507 U.S. at 731. Lower courts that have considered the issue have, however, held that jurisdiction cannot be reviewed using harmless error analysis. See United States v. Navarro, 989 F. Supp. 1273, 1277 (E.D. Cal. 1997). This Court has not yet explicitly so held, but has strongly suggested that jurisdiction cannot be reviewed using harmless error. See Gomez v. United States, 490 U.S. 858, 876 (1989) (magistrate lacks jurisdiction to voir dire felony jury and conviction must be reversed without regard to whether an error was harmless).

[6] If a finding of interstate commerce is necessary to confer subject matter jurisdiction, yet this Court nevertheless believes subject matter jurisdiction may be forfeited and reviewed using plain error analysis, Petitioners submit that subject matter jurisdiction falls within a "special category of forfeited errors" that can be corrected "regardless of their effect on the outcome." See Olano, 507 U.S. at 735. A strict adherence to Johnson's adherence to "overwhelming evidence" standard was thus a reversible error.

any further confusion in the lower courts, the Supreme Court should take this opportunity to definitively resolve this issue. Like venue, jurisdiction is very important in the resolution of criminal trials; both "are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests." See generally United States v. Johnson, 323 U.S. 273, 276 (1944). This case presents the opportunity to resolve subject matter jurisdiction in the federal criminal context.

B. By Strictly Adhering To Its "Overwhelming Evidence" Standard, The Fourth Circuit Misapplied *Johnson v. United States*, 117 S. Ct. 1544 (1997), And Overlooked This Court's Prior Precedents Including The History Of Plain Error Review.

Federal Rule of Criminal Procedure 52(b) provides a Court of Appeals limited power to correct an error that was forfeited because the error was not timely raised in District Court. Olano, 507 U.S. at 731.[7] The forfeited error "may be noticed" only if it is "plain" and "affect[s] substantial rights." Id. at 732 (alteration in original). "Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " Id. (quoting United States v. Young, 470 U.S. 1, 15 (1985) quoting United States v. Atkinson, 297 U.S. 157 (1936)). Olano held that the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, 297 U.S. 157 (1936). Id. at 736 ("The court of appeals should correct a

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[7] The text provides: "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' ") (citation omitted).

In Wilkinson, the Fourth Circuit reviewed for plain error, citing United States v. Olano, 507 U.S. 725 (1993). App., infra, 15. It interpreted Olano to hold that plain error review applied to forfeited errors only where: (1) there is an error; (2) the error was plain; (3) the error affects substantial rights; and (4) the court determines, after examining the particulars of the case, that the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. (citations omitted).

The Fourth Circuit summarily held that that the first two requirements were met. See id. Since no other instruction encompassed the missing instruction, the Fourth Circuit held that there was no evidence to indicate that the jury made the required finding, and thus, the third prong of Olano was satisfied. App., infra, 16. However, the Fourth Circuit stopped short of concluding that Olano compelled reversal, holding that the forfeited error could not be said to seriously affect the "fairness, integrity, or public reputation of judicial proceedings." Id. The Fourth Circuit relied on Johnson v. United States, 117 S. Ct. 1544 (1997) for its reasoning. Id.

As the Fourth Circuit interpreted Johnson, plain error review is not available when there is error, it is plain, it affects substantial rights, but the fairness and integrity of judicial proceedings have not been compromised. As the Fourth Circuit read Johnson, the fourth prong invites an analysis not of whether the trial was conducted in strict accordance with the law, but of whether the defendant was actually guilty notwithstanding serious defects in the proceedings. Using this approach, the Fourth Circuit held that this was not the appropriate case to correct a forfeited error because there was "overwhelming" evidence of an effect on interstate commerce. App., infra, 17. The Court did not explain how interstate commerce was affected, but

merely pronounced it apparent that there was some such effect.

As discussed above, the Fourth Circuit in Wilkinson concluded that Johnson held that plain error review has four requirements. But this interpretation, if correct, has not always been the way this Court has interpreted the plain error rule. The Court has often discussed two distinct requirements to test the appropriateness of plain error review. The first is a disjunctive test, as provided in the literal language of United States v. Atkinson, 297 U.S. 157 (1936). The second is a conjunctive test, which contains two requirements which must be satisfied before an appellate court may reverse for plain error. This is apparently the interpretation of Johnson and the Fourth Circuit in Wilkinson.[8]

The Supreme Court has historically avoided articulating a strict formula for lower courts to follow in applying the plain error doctrine. See Weems v. United States, 217 U.S. 349, 362 (1910) (describing the plain error rule as "not a rigid one"); see also Engle v. Isaac, 456 U.S. 107, 135 (1982) (characterizing plain error analysis as a "vague inquiry"). Atkinson is the historic test of plain error review in Federal criminal procedure, and was reaffirmed in Olano. See Olano, 507 U.S. at 736. It simply held that "if the errors are obvious, *or* if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings," appellate courts could take notice. Atkinson, 297 U.S. at 160 (1936) (emphasis added). Atkinson was followed for slightly less than half century by the Supreme Court. See, e.g., United States v. Frady, 456 U.S. 152, 163 n. 13 (1982). Frady summed up the underlying rationale of the rule: "Rule 52(b) was intended to afford a means for the

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[8] Petitioners acknowledge that this Court has previously rejected the notion of whether a disjunctive rule exists in plain error review exists. See Olano, 507 U.S. at 732. However, Petitioners submit that an entirely different disjunctive or conjunctive question has arisen, based on how this Court's interpretation of Atkinson has evolved.

prompt redress of miscarriages of justice." Frady, 456 U.S. at 163.

However, the disjunctive test began to evolve into a conjunctive test in United States v. Young, 470 U.S. 1 (1985), which interpreted Atkinson to require that appellate courts find that the claimed error not only seriously affected "substantial rights," but that it had an unfair prejudicial impact on the jury's deliberations. Young, 470 U.S. at 16 n. 14. If the rule were otherwise (if the proper approach were a disjunctive test), appellate courts would indulge in the "pointless exercise of reviewing 'harmless plain errors.' " Id. (citation omitted).

By the time Johnson was decided, this Court interpreted Olano to mean that a serious effect on the fairness, integrity, or public reputation of judicial proceedings was a requirement of plain error review. See Johnson, 117 S. Ct. at 1549. According to the Fourth Circuit, Johnson teaches that evaluation of overwhelming evidence of guilt, combined with the lack of a plausible response, is the test of whether the plain error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." App., infra, 17.

But the Fourth Circuit's strict adherence to Johnson disregards the historical practice underlying plain error review. While any application of plain error doctrine necessarily includes some form of prejudice inquiry, Johnson has produced and will continue to produce more mischief than clarity. See generally United States v. Robinson, 485 U.S. 25, 36 (1988) (Blackmun, J., dissenting). In contrast to collateral review jurisprudence, where "miscarriage of justice" means that the defendant is actually innocent, see Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992), the Court has made it clear that plain error analysis on direct appeal is not limited to cases of actual innocence. Olano, 507 U.S. at 736. Rather, Olano held that "an error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."

Olano, 507 U.S. at 736-37 (internal quotations omitted). Thus, a strict adherence to Johnson's "overwhelming evidence" standard is inconsistent with the principles of Olano, and the policy underlying plain error analysis.[9] The Court should take this opportunity to explain that Johnson should be read more broadly; if the concern is reversing for "harmless plain error," Johnson should be interpreted as imposing a harmless error rule onto plain error review. In order for the Court to maintain the consistency between harmless and plain error review, a better reading of Johnson is that the plain error involved there was "harmless beyond a reasonable doubt." See Chapman v. California, 386 U.S. 18, 24 (1967). In Chapman, the State of California used an "overwhelming evidence" of guilt standard when reviewing for harmless error to determine whether its state constitutional rule that emphasized whether "a miscarriage of justice" was satisfied. The Supreme Court rejected this approach to constitutional errors as not protective enough. See id. at 23. However, the Fourth Circuit in Wilkinson interpreted Johnson as injecting into plain error review the same sort of "overwhelming" evidence standard rejected by Chapman.

Thus, unless this Court clarifies that Johnson intended to provide "harmless beyond a reasonable doubt" standard, defendants will have more protection when a harmless constitutional error is committed than when a constitutional plain error is committed.[10] Moreover, to require appellate courts to consider whether there is "overwhelming" evidence before granting remand would conflict with the prohibition on trial judges granting a

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[9] Essentially, Petitioners argue that the weight Johnson places on the finality of convictions is particularly out of place when considering whether a court should exercise discretion in correcting a plain error on direct appeal.

[10] This is inconsistent with Olano, where the Court held that the prejudice inquiry is basically the same under both subsections of FED. R. CRIM. P. 52. See generally Olano, 507 U.S. at 734.

directed verdict against a defendant despite "overwhelming evidence" of guilt. See Sullivan v. Louisiana, 508 U.S. 275, 277 (1993). In order to resolve any inconsistency, the Supreme Court should clarify the prejudice standard under Johnson to be "harmless beyond a reasonable doubt." While a test of "beyond a reasonable doubt" is still inconsistent with Olano's teaching that the Rule 52(b) has nothing to do with actual innocence, clarification of the standard would at least correct the paradox that has been created.

Johnson also left unclear whether the "overwhelming evidence" standard is the only test that may be used by a lower court to determine whether the plain error "seriously affect[s] the fairness, integrity, or public reputation" of the judicial proceedings. See generally Johnson, 117 S. Ct. at 1550. Johnson's "overwhelming" evidence standard is not only a poor test for use in all circumstances, but is being applied differently in various situations. See, e.g., United States v. Martinez-Rios, et al., No. 97-1021 1998 U.S. App. LEXIS 9445, at *40-41 (2d Cir. May 4, 1998) (an arithmetic error in the course of sentencing that was not objected to was the sort of error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings;" Johnson's "overwhelming" evidence inquiry not performed). If the so-called "fourth prong" has historically been left to the discretion of the appellate courts, query whether it makes sense to impose a single mandatory test on lower courts before they may exercise their discretion.

In sum, this case presents the Court with an opportunity to provide the courts of appeals with some much needed guidance regarding the circumstances in which discretion may be exercised. As Justice Blackmun's observed in his dissent in Robinson:

> To clear the confusion reflected in [Young], this Court should either continue on the path it started down in Young and formulate a test for plain error that articulates the prejudice

> standard to be applied, or in the alternative, it should make clear, by reasserting the plain-error doctrine's lack of rigid definition, that its language in Young is not to be interpreted as a test. This latter course may be more true to the doctrine's purpose of allowing courts to single out the rare case in which allowing a conviction to stand would severely undermine the "fairness, integrity or public reputation of judicial proceedings."

Robinson, 485 U.S. 25, 36-37 (Blackmun, J., dissenting) (internal citation omitted).

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE A DISAGREEMENT AMONG THE CIRCUITS WITH REGARD TO THE APPLICATION OF THE MONEY LAUNDERING STATUTE AND CORRECT THE FOURTH CIRCUIT'S ERRONEOUS APPLICATION OF THAT STATUTE.

A. The Fourth Circuit's Holding That Petitioners' Transfers Of Funds To Their Separate Legitimate Businesses Promoted The Specified Unlawful Activity Conflicts In Principle With The Decisions Of The Seventh And Tenth Circuits.

The Court of Appeals' holding that the Petitioners' transfers of funds to their separate legitimate businesses "promoted" the specified unlawful activity conflicts with the principles announced in other circuits. Several circuits have recognized that simply using proceeds from a specified unlawful activity for what have been termed "lifestyle expenditures" does not "promote the carrying on of [a] specified unlawful activity" within the meaning of section

1956. 18 U.S.C. § 1956(a)(1)(A)(i) (emphasis added); see United States v. Jackson, 935 F.2d 832, 841 (7th Cir. 1991); see also United States v. Torres, 53 F.3d 1129, 1138-39 (10th Cir.) (reversing money laundering conviction based on transfer of funds for purchase of car, while affirming conviction based on use of transferred funds to buy more drugs for sale), cert. denied sub nom Aflleje-Torres v. United States, 515 U.S. 1152, and cert. denied sub nom Aflleje v. United States, 516 U.S. 883 (1995). In Jackson, the Seventh Circuit held that a drug dealer's use of drug money to pay his rent and his cellular phone bill did not constitute promotion because it did not further the predicate crime. Id. at 841. A person commits wire fraud if, with the requisite intent, he uses a wire transmission to further a "scheme to defraud."

In the case sub judice, the Petitioners were convicted of money laundering under § 1956(a)(1)(A)(i) on the theory that their loans to separate legitimate businesses advanced the scheme to defraud that was a part of the wire fraud. However, the Jackson Court sensibly recognized that not every transaction that involves the proceeds of the specified unlawful activity promotes the "carrying on" of that activity. Likewise, in United States v. Sanders, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991), the Tenth Circuit rejected the argument that the money laundering statute should reach all transactions that involve proceeds of the specified unlawful activity, cautioning that "to so interpret the statute would . . . turn the money laundering statute into a 'money spending statute.'" Id. at 946.

The Fourth Circuit is not alone in its expansive interpretation of "promotion" under § 1956(a)(1)(A)(i). In United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991), the Ninth Circuit found that defendant's act of depositing the proceeds of a bribery transaction into his personal checking account promoted the specified unlawful activity, i.e., the bribery transaction. If left uncorrected, Montoya and the case sub judice threaten to turn the money laundering statute into a "money spending statute," a result

which other circuits have prudently avoided. See Sanders, 928 F.2d at 946.

B. This Court Should Clarify And Limit The Reach Of The Money Laundering Statute.

This Court should grant certiorari in order to correct the Fourth Circuit's erroneous application of the federal money laundering statute, 18 U.S.C. § 1956. As this statute is increasingly applied to "white collar" crimes like wire fraud, see Robert G. Morvillo & Barry A Bohrer, Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation, 32 AM. CRIM. L. REV. 137, 145 (1995) (citing study that found forty percent of the crimes for which money laundering sentences were imposed were "white collar" crimes unrelated to drug trafficking), lower courts would benefit from this Court's guidance on how to apply the money laundering statute in these cases. See also U.S.S.C., REPORT TO CONGRESS: SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DOJ REPORT, 6-7 (Sept. 18, 1997) ("[T]he [United States Sentencing] Commission continues to see money laundering sentences imposed where the money laundering conduct is so attenuated as to be virtually unrecognizable as the type of conduct for which the original money laundering sentencing guidelines were drafted").

1. Transactions that are a part of the "scheme to defraud" cannot support a conviction for money laundering because those transactions are part of the predicate crime of wire fraud itself.

Petitioners' loans to their other businesses cannot constitute § 1956 money laundering because those transfers formed a part of the predicate crime. One of the necessary elements of wire fraud is a "scheme to defraud." See 18

U.S.C. § 1343. Specifically, the wire transmission must be made "for the purpose of executing such scheme or artifice." See id. The problem with construing § 1956 broadly when it is based on the predicate crime of wire fraud is that transactions which are a part of the scheme to defraud can always be viewed as either promoting or concealing that scheme. Cf. United States v. Sawyer, 799 F.2d 1494, 1502 (11th Cir. 1986) ("Fraudulent conduct that will establish a 'scheme to defraud' includes knowingly making false representations or concealing material facts" (internal citations omitted)), cert. denied sub nom Leavitt v. United States, 479 U.S. 1069 (1987). Under the construction urged by the Government and adopted by the Fourth Circuit, the very transactions that constitute a "scheme to defraud" for the purpose of demonstrating wire fraud themselves constitute money laundering. This construction must be rejected because, contrary to the intent of Congress, it punishes defendants twice for the same activity. See United States v. Edgmon, 952 F.2d 1206, 1213 (10th Cir. 1991) ("Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered"), cert. denied, 505 U.S. 1223 (1992).

2. The plain language of the money laundering statute requires the Government to prove that the transactions involved the proceeds of specified unlawful activity; it cannot assume that payments made from an account involved such proceeds simply because proceeds had previously been commingled with other funds in that account.

Under § 1956(a)(1)(B), the Government is required to prove that the defendant knew that the "property"

involved in the financial transaction at issue represented the proceeds of the specified unlawful activity. In this case, the Government relied on repayments from the Petitioners' separate legitimate businesses back to MPS. Although the Government demonstrated that proceeds from the wire fraud had previously been transferred from MPS to the businesses, it offered no proof that the funds repaid to MPS were the same funds that MPS had transferred in the first instance. Each of the transferors had many other sources of income during the months between their receipt of funds from MPS and their repayment of those funds, income which far exceeded the amount of the transfers alleged to constitute money laundering. See Brief of Appellants at 27. This Court should grant certiorari to correct the erroneous interpretation of § 1956(a)(1)(B) that the Fourth Circuit and numerous other circuits have adopted.

The Seventh and Tenth Circuits have said that "it will be a rare case in which [the design] requirement[ ] will be satisfied without proof that the funds used in the charged transaction were derived in substantial measure from 'specified unlawful activities' rather than some other legal or illegal conduct." United States v. Garcia-Emanuel, 14 F.3d 1469, 1475 (10th Cir. 1994) (alterations in original) (quoting Jackson, 935 F.2d at 840). This is consistent with the plain language of the statute, which provides that the accused transaction must "*in fact involve*[ ] the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1) (emphasis added). Several circuits have relaxed this clear statutory requirement when the proceeds of specified unlawful activity are commingled with other legally acquired funds, reasoning that to apply this statute as it is written would permit criminals to escape a § 1956(a)(1)(B) money laundering conviction by simply commingling illegally obtained funds with legally obtained funds. However, it is up to Congress to rewrite the statute, not to the circuit courts. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so . . . ." Brogan v.

United States, 118 S. Ct. 805, 811-12 (1998); see also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms" (internal quotations omitted)); United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest"), quoted in Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964).

3. The plain language of § 1956(a)(1)(B)(i) only criminalizes "financial transactions" that are designed to conceal the proceeds of specified unlawful activity; it does not reach the making of records about the transaction.

To be convicted under § 1956(a)(1)(B)(i), the Government also had to prove that Petitioners "conduct[ed] . . . a financial transaction . . . knowing that the financial transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source the ownership, or the control of the proceeds of specified unlawful activity . . . ." Petitioners' convictions on the concealment counts rest on the fact that their separate legal businesses were given false names in MPS's books. The Fourth Circuit held that the transfer of money from Petitioners' separate legitimate businesses to the MPS bank account amounted to concealment because the jury could infer that Petitioners would not have engaged in these transactions but for the knowledge that MPS would doctor the books. See app., infra, 14.

The Fourth Circuit's holding takes an overly broad view of the term "transaction." Section 1956 defines "transaction," in pertinent part, as including "a transfer,

delivery, or other disposition, and with respect to a financial institution includes a deposit, . . . transfer between accounts, . . . or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." 18 U.S.C. § 1956(c)(3). The plain meaning of the statute limits the meaning of "transaction" to transfers of property. Although the transfer of funds was a "transaction," the doctoring of the books was not a transaction or a part of a transaction as that term is defined by § 1956(c)(3) because it involved no transfer of property. Indeed, the "financial transaction" in each instance would have been precisely the same had it been described accurately in MPS's books – or had it not been described at all.

Congress's intent to limit the definition of "transaction" to those set forth in the text is clear and should not be expanded by the courts. See United States v. Bell, 936 F.2d 337, 341 (7th Cir. 1991). The falsifications in MPS's internal accounting records at worst suggest that Petitioner attempted to mislead HLI as part of the scheme to defraud. See United States v. Napoli, 54 F.3d 63, 68-69 (2d Cir. 1995). That may be fraudulent, but it is not money laundering.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS OVER THE PROPER STANDARD OF MATERIALITY IN A PROSECUTION FOR PERJURY DURING A CIVIL DEPOSITION, AND VACATE PETITIONER CONK'S CONVICTION FOR LACK OF ANY EVIDENCE OF MATERIALITY.

A. The Circuits Are Divided Over The Proper Standard Of Materiality Under The Perjury Statute As It Applies To False Statements Made In Civil Depositions.

In its opinion, the Fourth Circuit observed that the circuits are split over the proper materiality standard in the context of civil depositions. See app., infra, 19. In the Second Circuit, a false statement in a civil deposition is material if a "truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit." See United States v. Kross, 14 F.3d 751, 754 (2d Cir.), cert. denied, 513 U.S. 828 (1994), cited in app., infra, 19. The Fifth Circuit has adopted a similar standard. See app., infra, 19 (citing United States v. Holley, 942 F.2d 916, 923 (5th Cir. 1991)). However, the standard is considerably higher in the Sixth and Ninth Circuits. See app., infra, 19. In these circuits, such a false statement is material if the topic of the statement is discoverable and the statement itself tended to affect the outcome of the civil suit for which the deposition was taken. See United States v. Clark, 918 F.2d 843, 846 (9th Cir. 1990), overruled on other grounds by United States v. Keys, 95 F.3d 874, 878 (9th Cir. 1996), cert. granted and judgment vacated, 117 S. Ct. 1816 (1997); United States v. Adams, 870 F.2d 1140, 1146-48 (6th Cir. 1989). The Fourth Circuit declined to consider which standard was appropriate because it found that Conk's false statement was material even under the more stringent

standard of the Sixth and Ninth Circuits. See app., infra, 27. This result is troubling in light of the Government's failure to introduce any evidence about the civil case for which the deposition was taken and the Fourth Circuit's failure to determine an appropriate standard for materiality. In light of the potential significance of this issue, this Court should take this opportunity to determine the appropriate standard of materiality for perjury cases in the context of civil depositions.

B. Petitioner Conk's Perjury Conviction Must Be Vacated Because No Evidence Was Presented To Show That The False Statements Were Material Under Any Standard.

Petitioner Conk was convicted of one count of perjury in violation of 18 U.S.C. § 1623 for allegedly making a false statement in a deposition in a civil case. The count alleged that Petitioner lied when he denied knowing that "American Surgical" was the false name used in MPS records to refer to DayDream Publishing. In order to convict Conk of perjury, the prosecution was required to prove that he knew that he was making a false statement, and that the falsity was material. See 18 U.S.C. § 1623. This conviction should be reversed because the prosecution did not introduce any evidence as to materiality.

This Court does not ordinarily grant certiorari to "review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). However, where, as here, there is an utter lack of evidence to support a conviction, the Court has granted certiorari to consider whether such a baseless conviction comports with the Due Process Clause. See, e.g., Garner v. Louisiana, 368 U.S. 157, 163-64 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960) (stating that this question "turns not on the sufficiency of the evidence, but on whether this conviction

rests upon any evidence at all"); see also Washington v. United States, 357 U.S. 348 (1958) (reversing a federal conviction "because of the insufficiency of the evidence"). Petitioner's perjury conviction should be vacated because the prosecution did not introduce evidence to prove materiality.

"Deciding whether a statement is 'material'," this Court has noted, "requires the determination of at least two subsidiary questions of purely historical fact: (a) 'what statement was made?'; and (b) 'what decision was the agency trying to make?'" United States v. Gaudin, 515 U.S. 506, 512 (1995). In this case, the Government offered proof of (a), but offered no evidence whatsoever of (b). Therefore, the evidence adduced could not support the required finding of materiality.

The Government did not call a single witness to testify about the purpose of the civil suit that involved the deposition in which Petitioner Conk made the allegedly false statement. Nor did the Government call any witnesses to testify about the nature of the inquiry at the deposition or the effects that Conk's answer might have had on the proceedings.[11] It did not introduce the complaint or any other document that showed what HLI was seeking in its civil suit. In short, there was nothing in the record (save argument) from which a reasonable jury could determine the context in which Petitioner Conk's statement was made, and, therefore, whether it had the "tendency to influence" or was "capable of influencing" the person making the inquiry. United States v. Littleton, 76 F.3d 614, 618 (4th Cir. 1996).

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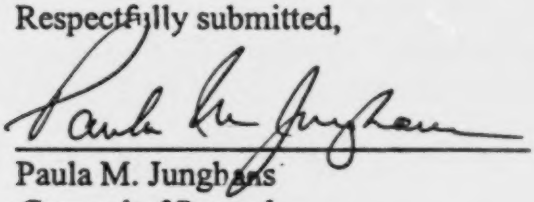
[11] Only two Government witnesses testified in any way about litigation between HLI and MPS or the defendants. Both testified only in generalities to the effect that there was litigation, a judgment and a settlement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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